No. 281.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

PACIFIC COAST STEAMSHIP COMPANY,
Appellant,

vs.

EBEN W. FERGUSON et al.,
Appellees.

BRIEF FOR APPELLEES.

E. B. & GEO. H. MASTICK,
Proctors for Appellees.

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Brief for Appellees.

STATEMENT.

The statement of facts in appellant's brief is inadequate for a proper presentation of this case. Counsel for appellant has stated, as facts, only what he conceives the testimony on behalf of libelant tends to prove, and has practically ignored the testimony given for respondents in contradiction thereof. Nor do we agree that even the evidence for libelant tends to prove what counsel claims.

We therefore think it best to make a complete statement of the facts.

The testimony of the witnesses in this cause is, as to certain matters, very conflicting; but, as to most of the material facts, there is no dispute. We will first state the facts as to which there is no conflict, and then, separately, the testimony on the disputed matters.

The evidence shows, without conflict, these facts: The libelant was engaged in the business of transporting freight and passengers by steamship between various points on the Pacific Coast.—among others, between San Francisco and San Diego; on which latter route there was a stopping point called Moss Landing. At that place libelant had a warehouse, in which it received property on storage. Moss Landing was also a station on the Pajaro Valley Railroad. Some grain, amounting in the year in question to several hundred tons, is raised near Moss Landing, and hauled to the warehouse there by teams; but the greater portion of the grain stored there is brought by the railroad from interior points. On October 15, 1894, libelant received in that warehouse from one J. R. Silveira 271,510 pounds of barley, for which it delivered to him a negotiable receipt, (pp. 66–8) which acknowledged the receipt of that grain in that warehouse, "for storage and shipment to San Francisco, at "the rates and subject to the conditions on reverse side" thereof. On the back of this receipt was a list of "Rates and Conditions," containing, among other things, the following:

"Rates for 2,000 lbs.

"Storage for the first month or fraction of month after Oct. 12, 1894..... 25c.

* * * * *

"For transportation to San Francisco, via Pacific Coast S. S. Co.'s Vessels, * * * $3.50

* * * * *

"While the goods are in the warehouse, the company shall be liable only as warehousemen, and not as carriers.

"Goods may be withdrawn from warehouse for local use or consumption on payment of accrued storage and endorsement of and surrender of warehouse receipt.

* * * * *

"When you want the within mentioned article shipped, fill out in ink the following order, and send it to the warehouse."

This receipt was afterward endorsed by Silveira, and passed in the course of business to Waterman & Co., grain merchants at San Francisco. This grain, it appears, had been shipped from Blanco to Moss Landing, over the railroad.

Respondents were commission merchants at San Francisco. They received an order from the Howard Commercial Company at San Diego to purchase a quantity of barley and ship the same to it at San Diego. On inquiry in the market, they received an offer from Waterman & Co. to sell them this lot of barley, "free on board" at Moss Landing. Thereupon, on October 26, 1894, Mr. Ferguson, one of the respondents, communicated by tele-

phone with Mr. Cooper, a gentleman in the employ of libelant, and asked him to name a rate at which libelant would transport this barley from Moss Landing to the Howard Commercial Company at San Diego. Mr. Cooper stated that the rate would be $3.10 per ton of 2000 pounds. It appears that the Howard company had an arrangement with libelant for a special rate on barley from San Francisco to San Diego of $2.50 per ton; and Mr. Ferguson endeavored to induce Mr. Cooper to make the same rate from Moss Landing; but Mr. Cooper refused to recede from the rate fixed of $3.10 per ton. Several interviews followed between Mr. Cooper and respondents, as to the details of which the testimony is conflicting. The result, however, was that respondents purchased the grain from Waterman & Co., deducting from the purchase price the sum of 25 cents per ton for storage, shown to be due by the warehouse receipt, received the receipt and ordered the grain to be shipped by libelant to San Diego, which was done on November 2d. The witnesses agree that, by the arrangement between the parties, libelant was to deliver the grain at San Diego to the Howard company upon the payment of $2.50 per ton freight, and respondents were to pay the balance of the freight rate and the 25 cents per ton storage. Libelant claims that respondents further agreed to pay $1.00 per ton for the original transportation of the grain over the railroad from Blanco to Moss Landing. Respondents deny this; and the testimony on this point is conflicting, and will be stated hereafter. Under the arrangement, whatever it was, the grain was shipped and delivered at San Diego to the Howard company, and that company paid to libelant

$2.50 per ton on account thereof. Respondents thereupon tendered and offered to pay to libelant the balance of the freight rate of $3.10 per ton,—namely, 60 cents per ton,—and the 25 cents per ton for storage; amounting in all to $115.39. Libelant refused to accept this amount, claiming that respondents should also pay the $1.00 per ton railroad charges, amounting to $135.76; and this charge is the only matter in controversy between the parties in this suit. In the libel, it is alleged that libelant agreed to transport the grain from Moss Landing to San Diego for $4.35 per ton, and libelant claims $251.15 as the balance of "freight" due for such transportation. The answer denies any agreement for freight at $4.35 per ton or at any rate greater than $3.10 per ton, admits an agreement to pay $3.10 per ton freight and 25 cents per ton storage, and pleads payment of $2.50 per ton and tender of the balance of 85 cents per ton, the amount of which tender—$115.39—respondents brought into court with their answer.

On the question whether or not respondents agreed to pay the $1.00 per ton, alleged railroad charges, we will state the testimony in connection with our argument of that question. For the present, it is sufficient to say that the evidence, *viewed most favorably for libelant, and excluding all the testimony on behalf of respondents contradicting that on behalf of libelant,* tends, at the most, to prove that the contract between the parties was this: That libelant should transport the grain to San Diego for $3.10 per ton, and there deliver it to the Howard Commercial Company upon the payment of $2.50 per ton; and that respondents should, after such delivery, pay to

libelant the balance of said freight rate, namely, 60 cents per ton, the 25 cents per ton for storage, and whatever railroad charges might be found to have accrued on the grain prior to its delivery at the warehouse at Moss Landing. (It is undisputed that neither Mr. Cooper nor respondents, at the time of the making of the contract, knew where this grain originated, or whether there were any back railroad charges on it, and that respondents had no notice of the possible existence of any such charge, unless it was given to them by Mr. Cooper during the progress of the negotiations.)

On the other hand, we contend that no contract on the part of respondents to pay any railroad charges was proved; but that the proof shows, by a preponderance of evidence, that respondents bought the grain and paid the purchase price thereof on the faith of the terms of the warehouse receipt and of the agreement of libelant to transport it to San Diego for $3.10 per ton, and without any notice of any charge thereupon except the storage charge of 25 cents per ton shown by the receipt, and that they never contracted to pay and were not requested by libelant to pay any other charge whatever.

This being the state of the case, we submit:

1. That, assuming the facts to be as the testimony for libelant tends to prove, a court of admiralty has no jurisdiction of the alleged contract to pay railroad charges, because the jurisdiction of courts of admiralty, in cases of contract, is confined to those contracts which are *purely* maritime; a contract to pay railroad charges is not a maritime contract; if the contract claimed by libelant be regarded as entire and not separable, a material and sub-

stantial portion of it is not maritime, and therefore the contract is not at all maritime; while, if that contract be regarded as separable, as in fact it is, the only portion of it in controversy in this case is not maritime, and cannot be made the basis of a recovery in admiralty.

2. That the alleged contract to pay railroad charges is not proven

In his brief, counsel for appellants claims that libelant applied, and had the right to apply, the payment of $2.50 per ton by the Howard company, in part to the payment of this disputed charge for railroad transportation, and that this suit, therefore, concerns only a claim indisputably maritime. We shall show that the facts are not as claimed, and that there never was, and could not lawfully have been, any such application of that payment.

Counsel also claims that the District Court erred in awarding costs to the respondents; but we shall show that the decree was correct in this, as in all other respects.

We will discuss these propositions separately, and, so far as possible, in such order as to avoid repetition.

Argument.

I.

THE CONTRACT RELIED ON BY LIBELANT IS SEPARABLE AND NOT ENTIRE; AND THE ALLEGED CONTRACT TO PAY RAILROAD CHARGES IS SEPARATE AND DISTINCT FROM THE CONTRACT TO PAY FREIGHT BY SEA.

The contract, assuming it to be as libelant's testimony tended to prove, consisted of two distinct parts: first, that libelant, *as a warehouseman*, would deliver the grain out of its warehouse into the ship, respondents paying it therefor such charges for storage and prior transportation as had accrued; and, second, that libelant, *as a carrier*, would transport the grain to San Diego, respondents paying it therefor the sum of $3.10 per ton.

The rule on this subject is, that "if the part to be "performed by one party consists of several distinct "and separate items, and the price to be paid by the "other is apportioned to each item to be performed, or "is left to be implied by law, such a contract will gen- "erally be held to be severable."

2 Parsons on Contracts, (8th Ed.,) *517, and authorities there cited.

This case is manifestly within that rule. The amounts which libelant claims that respondents agreed to pay, were clearly and distinctly apportioned to separate items; respondents were to pay $3.10 per ton for the transportation from Moss Landing to San Diego, they were to pay 25 cents per ton for the storage (already accrued) in the warehouse, and libelant claims that they were to pay whatever back railroad charges had accrued for the pre-

vious transportation by land to libelant's warehouse. This latter item, of course, could not concern libelant, unless it had paid or agreed to pay it to the railroad company, or unless the railroad company had a lien on the grain in the warehouse for its freight charge. In either of these alternatives, the libelant was interested only as a warehouseman, that is, interested not to permit the grain to leave the warehouse without payment of this charge. Clearly, then, the payment of storage and back freight charges, if agreed to by respondents, was, by the alleged contract, apportioned solely to the delivery of the grain out of the warehouse, and had no connection with the further contract for transportation by sea. These two portions of the contract were so distinct that they might well have been entered into at different times, and the consideration for each was wholly separate and independent.

In this connection, and in connection with other points in the case, it is important to notice the distinction between the libelant as a warehouseman and the libelant as a carrier. It is evident that libelant, though a carrier, was also actively engaged in the entirely different business of a warehouseman. The warehouse receipt in question, though containing other contracts, is clearly a storage receipt. It expressly provides that the company holds the goods in the warehouse "*only as warehousemen and not as carriers*," and expressly provides for the withdrawal of the goods from the warehouse for purposes other than shipment. But, beyond all this, it is the settled law that a carrier who has received goods for transportation, but who holds them awaiting orders for shipment, is,

while he so holds them, a mere warehouseman and not a carrier; and the same rule holds in the case where the carrier retains the goods after the transportation is completed, until the consignee chooses to take them away.

St Louis, A. & T. H. R. Co., v. *Montgomery*, 39 Ill. 335;

Barron v. *Eldredge*, 100 Mass 455;

Mt. Vernon Co. v. *R. R. Co.*, 92 Ala. 296;

O'Neill v. *R. R. Co.*, 60 N. Y. 138;

Schmidt v. *Ry. Co.*, 90 Wis. 504;

The Richard Winslow, 67 Fed. Rep. 259; 71 Fed. Rep. 426.

The contract in question, then, necessarily consisted of two contracts: one with the libelant as a warehouseman, and one with it as a carrier; and the fact that these contracts were made at the same time, related to the same general subject, and were parts of one transaction, does not make them any the less two contracts. The alleged contract to pay railroad charges could, therefore, have been separately sued upon, even if the grain had been lost at sea so that no freight could be earned; and this suit is a suit on that contract alone.

II.

THE ALLEGED CONTRACT TO PAY BACK RAILROAD CHARGES WAS NOT A MARITIME CONTRACT, OF WHICH COURTS OF ADMIRALTY HAVE JURISDICTION, AND WAS NOT MADE SO BY BEING CONNECTED WITH OR DEPENDENT UPON A MARITIME CONTRACT.

The jurisdiction of courts of admiralty in this country, in cases of contract, is confined to contracts of the kind

called maritime. In order to determine whether a contract is maritime or not, regard is to be had solely to the nature of the acts agreed to be done, and it is not maritime unless it concerns rights and duties pertaining to commerce and navigation.

The Eclipse, 135 U. S. 599, 609.

In order, then, that a contract may be regarded as maritime, it must directly relate to the employment of a vessel as an instrument of commerce, or to the navigation of a vessel so employed. If the contract does not directly relate to one of those subjects, it is not maritime, even though it be preliminary to a maritime contract, or though it be made in consideration of a maritime service, or though it be made at the same time as a maritime contract and as a part of the same transaction. The nature and extent of the rule will best be seen by reference to some of the cases in which it has been applied.

The case of *The Pulaski*, 33 Fed. Rep. 383, is almost precisely like the one at bar. That was a libel upon a contract, by the terms of which the libelant delivered on board a vessel a quantity of wheat, to be held and stored on board until the opening of navigation, unless sooner discharged by the shipper; and, if not discharged, the wheat was to be transported by the vessel to some other port, *for the consideration of two and a quarter cents per bushel for proper storage during the winter, and the going freight for transportation.* This contract was held not to be maritime, and the court said:

"The contract is primarily for storage, and the trans-
"portation is a mere contingency, possible or probable, in
"the future. The wheat is received subject to the order

"of the shipper, who may demand a redelivery the next "day; *and, even if it were definitely understood that the "wheat was to be transported upon the opening of navi- "gation to a distant port, the fact that a separate price was "charged for the storage during the winter would tend to "show that, in fact, there were two separate contracts, one "only of which was maritime.* * * * To be the sub- "ject of an admiralty lien for a breach of contract, the "vessel must be, at the time, engaged in commerce and "navigation, or in preparation therefor, *and the service "must be maritime in its nature.*"

In the case at bar, the railroad charges, if any, had accrued, and the contract for storage had been entered into, long before the contract for transportation to San Diego was made or thought of. It is therefore clear that, as against Silveira, no suit in admiralty could have been maintained for the railroad charges. As said in the case cited, the contract with him was primarily one for storage, and the transportation a mere contingency. The contract with respondents was made only on the theory that they had succeeded to Silveira's liabilities, and that they should pay what he was bound to pay. The fact, if it be a fact, that respondents expressly agreed to pay the railroad charge, became necessary only because that charge was not specified in the warehouse receipt. Had it been there specified, they would have been bound to pay it. The utmost effect of the statements testified to by Mr. Cooper was merely that respondents thereby had notice of a possible lien on the barley for prior transportation, which they had to discharge or assume to pay before they could remove the barley from the warehouse. They were,

therefore, merely performing the contract made by Silveira, which, as shown by the case cited, was in no sense maritime.

But, even were it otherwise, the rule would still be as stated in that case. Libelant's contention is not that respondents agreed to pay $4.35 cents per ton for transportation from Moss Landing to San Diego, (though it is so stated in the libel); but it is that, in consideration that libelant should so transport the barley, and should deliver it at San Diego upon an agreed part payment, respondents would pay $3.10 per ton for that transportation, and would *also* pay *whatever back charges had previously accrued on the grain*, the amount thereof not being then specified or even known. As said in the case cited, the fact that this alleged promise was to pay for the storage and railroad charges, *as such*, and that a separate price was charged for the freight by sea, shows that there were really two contracts, of which the former was not maritime. In either point of view then, the case cited is, in principle, precisely like the present one.

The case of *The Richard Winslow*, 67 Fed Rep. 259, is the converse of the one last cited, and is, in one respect, even stronger. The contract there was that the vessel should immediately transport certain grain to another port, and there keep it, *in the vessel*, during the winter, unless sooner unloaded by the shipper, *the price for the entire service being fixed at three cents per bushel.* It was held that a court of admiralty had no jurisdiction of a libel for damage to the cargo while the grain was

held in the vessel at the port of arrival. The court said:

"If any cause of action is shown, I think it is not within the cognizance of admiralty. With the termination of the carriage the water-borne character of the contract ceased, and the vessel was converted into a mere winter storehouse for the corn. It is true that the ordinary contract of affreightment includes, and is only discharged by, delivery to the consignee; but here there was a constructive delivery, so far as concerned that contract, and thenceforward the corn was taken under the new bailment, that of warehouseman. Jurisdiction of that liability does not pertain to the admiralty." [Citing *The Pulaski, supra.*] "The storage here in question was no more an incident of the transportation than it was there. The division of the contract into its separate characters is here marked by the constructive delivery at Buffalo. The storage side of the contract was not maritime."

That case, as before remarked, is especially strong, because there one single price was fixed for the entire service,—both transportation and storage.

That case was affirmed (since the decision of the case at bar in the District Court) by the Circuit Court of Appeals (71 Fed. Rep. 426,) the court saying:

"The contract here was dual in its character. * * * A maritime contract must concern transportation by sea. It must relate to navigation and to maritime employment. It must be one of navigation and commerce on navigable waters. Unquestionably there was here

" a contract for carriage by sea, and that contract was " maritime in its nature. But there was joined with it a " contract with respect to the cargo after the completion " of the voyage, that was in no respect maritime in its " nature."

In *The Murphy Tugs*, (28 Fed. Rep. 429, 432,) a charge for wharfage of a vessel while laid up for the winter was held not to be maritime or within the admiralty jurisdiction. A similar ruling was made in *The Sirius*, (65 Fed. Rep. 226,) as to the services of a ship's keeper while the vessel was out of commission; in *The Hendrick Hudson*, (Fed. Cas. No. 6,355,) as to salvage of a dismantled vessel not then employed in commerce and navigation; in *A Raft of Cypress Logs*, (Fed. Cas No. 11,527.) as to services in navigating a raft of logs on navigable waters; and in *Gurney* v. *Crockett*, (Fed. Cas. No. 5,874,) as to a ship's keeper. Each of those cases was decided upon the principle above stated.

This rule was applied as long ago as 1803, in the case of *L'Arina* v. *Manwaring*, (Fed. Cas. No. 8,089). There the master of a vessel. lying at Havana, contracted to employ the libelant, for a voyage to Charleston and return, at certain monthly wages; which contract provided that if the voyage should be changed, or if the vessel should not return to Havana, the libelant should receive 200 dollars above his monthly pay. It was held that the contract was separable, and that the provision for the payment of the 200 dollars was not within the admiralty jurisdiction, though connected with a maritime contract.

It is evident, therefore, that, regarding the alleged

contract to pay railroad charges as distinct and separable from the contract for transportation by sea, (as we submit it should be regarded,) no recovery can be had in admiralty upon that contract. The consideration for that promise, if such promise there was was the prior and completed transportation by land. Indeed, it was, in terms, a promise to pay for such prior transportation by land. Though connected with a contract for transportation by sea, and forming with it a single transaction, it was nevertheless a separate and distinct contract, not maritime in its nature, and not cognizable in admiralty.

Counsel for libelant claims that this alleged promise was made in consideration of the agreement to transport by sea and to deliver to the consignee upon payment of a part only of the freight charge. His position is, substantially, that libelant said to respondents, "We will transport this grain to San Diego for $3.10 per ton, and there deliver it to the consignee on the payment of only $2.50 per ton, if you will agree to pay the balance of 60 cents and whatever railroad and storage charges have already accrued." The evidence, considered most favorably for libelant, does not warrant any such construction of the contract, as we will hereafter show. But, granting its correctness for the sake of the argument, it does not distinguish this case from that of *The Pulaski*, and still less from that of *The Richard Winslow*. State it in what form of words you will, it was nothing but a contract to pay for land transportation. It is not claimed by libelant that respondents agreed to pay, in addition to the $3.10 per ton, either $1.00 or $1.25 per ton. It is merely claimed that they agreed to pay the railroad and storage charges

if any there were. If there had proved to be no such charges, they would have had nothing to pay on that account. If it were true, then, that that promise was made, and was made in consideration of the agreement to transport by sea, that fact would not render the promise a maritime one; and it would be no more within the jurisdiction of a court of admiralty than a promise to convey a tract of land in consideration that the promisee should transport certain freight for the promisor by sea.

III.

THE JURISDICTION OF COURTS OF ADMIRALTY, IN CASES OF CONTRACT, IS LIMITED TO SUCH CONTRACTS AS ARE PURELY MARITIME; AND, THEREFORE, IF THE ALLEGED CONTRACT BE REGARDED AS ENTIRE AND NOT SEPARABLE, NO PART OF IT IS WITHIN THE ADMIRALTY JURISDICTION.

We have so far discussed the case on the theory (which we believe to be correct) that the alleged stipulation for the payment of railroad charges is separable from the rest of the contract. But, if we should concede the contract to be entire, in such sense that the agreement to transport the grain from Moss Landing to San Diego could not, for any purpose, be separated from the agreement to pay for the prior transportation by land, the only result would be that the contract would be not at all maritime, and there would be no jurisdiction in admiralty as to any part of it. When any material or substantial part of an indivisible contract is of a character not maritime, the courts of admiralty are without jurisdiction, even though some parts of the contract would be, if standing alone, of a maritime

nature. This doctrine has been uniformly maintained in this country.

In *Grant* v. *Poillon*, 20 How. 162, 168, the court said:

"The jurisdiction of courts of admiralty is limited, in "matters of contract, to those, and to those only, which "are maritime."

And the court quoted with approval the following language from the syllabus to *Plummer* v. *Webb*, *infra*:

"A contract of a special nature is not cognizable in the "admiralty, *merely because the consideration of the contract* "*is maritime*. The whole contract must, in its essence, "be maritime, or for compensation for maritime service."

In *People's Ferry Co.* v. *Beers*, 20 How. 393, 401, the court said:

"The admiralty jurisdiction, in cases of contract, de- "pends primarily upon the nature of the contract, and "is limited to contracts, claims, and services, *purely* "maritime, and touching rights and duties appertaining "to commerce and navigation."

In *The Belfast*, 7 Wall. 624, 637, the court, enumerating the subjects of admiralty jurisdiction, said:

"Contracts, claims, or service, *purely* maritime, and "touching rights and duties appertaining to commerce "and navigation, are cognizable in the admiralty."

In *Ex parte Easton*, 95 U. S. 68, 72, the court said:

"Admiralty and maritime jurisdiction is conferred by "the Constitution, and Judge Story says it embraces two "great classes of cases,—one dependent upon locality, "and the other upon the nature of the contract. * * *

"Speaking of the second great class of cases cognizable in the admiralty, Judge Story says, in effect, that "it embraces all contracts, claims, and services which "are *purely* maritime and which respect rights and "duties appertaining to commerce and navigation. * * *

"Maritime jurisdiction of the admiralty courts in "cases of contracts depends chiefly upon the nature of "the service or engagement, and is limited to such subjects as are *purely* maritime, and have respect to commerce and navigation within the meaning of the "Constitution."

And, in *The Eclipse*, 135 U. S. 599, 609, the court said:

"The [admiralty] jurisdiction embraces all maritime "contracts, torts, injuries or offenses, and it depends, "in cases of contract, upon the nature of the contract, "and is *limited* to contracts, claims, and services *purely* "maritime, and touching rights and duties appertaining "to commerce and navigation."

This principle was applied in *Plummer* v. *Webb*, (Fed. Cas. No. 11,233,) by Judge Story, who did more than any one to enlarge the conception of admiralty jurisdiction to its present wide extent. That case was a libel *in personam* for breach of a contract by which the minor son of the libelant was shipped by his father on a vessel of which the defendant was master, to serve on the vessel without wages, and by which the master agreed, among other things, to give the boy good, careful, tender, and paternal usage. The breach alleged was a

violation of the latter stipulation. The libel was dismissed for want of jurisdiction. Judge Story, after a splendid vindication of his course in contending for the most liberal construction of the powers of courts of admiralty, said:

"The difficulty is in affirming this contract to be *solely* "*and exclusively* a maritime contract. * * * So far "as the services of the boy are concerned, these services "are principally maritime; but they constitute, not the "ground of the present claim, *but the consideration for* "*the stipulations of the Master for paternal and proper* "*usage*. * * * I cannot say that the whole contract "is here of a maritime nature. There is mixed up in it "obligations ex contractu not necessarily maritime; and "so far the contract is of a special nature. In cases of "a mixed nature it is not a sufficient foundation for ad-"miralty jurisdiction, that there are involved some ingre-"dients of a maritime nature. *The substance of the* "*whole contract must be maritime*. * * * If the "contract were to convey a farm or a house, or to build "a mill, or to furnish manufacturing machines, or to "weave cloth, in consideration of marine services, it "would hardly be contended that a court of admiralty "had authority to enforce these special stipulations. In "such a mixed contract the whole would most appropri-"ately belong to a court of common law. After consid-"erable reflection upon the subject, I have not been able "to persuade myself that a contract 'for good, careful, "kind, tender, and parental usage,' in consideration of "marine services, upon a special retainer without wages, "is properly cognizable in an admiralty forum."

And the syllabus of that case, prepared, as we are told by Judge Story himself, contains the language quoted by the Supreme Court in *Grant* v. *Poillon, supra.*

This question was elaborately considered by Mr. Justice Nelson in *The Pacific.* (Fed. Cas. No. 10,643.) The jurisdiction of the court of admiralty was maintained in that case, on the ground that the contract was maritime in all its parts; but the principle for which we contend was vigorously maintained. The court there said:

"The first ground of objection is founded upon a course "of reasoning which cannot be maintained. It assumes "that the contract is severable, and that parts of it may "properly be the subject of admiralty cognizance, being "for maritime services, and parts of it not, being for "services that relate to subjects not maritime in their na- "ture or object; and that, if the cause of action arises "from a breach of the latter stipulations, the remedy is "in the common law courts, and if of the former, it may "be in the admiralty, assigning the jurisdiction to the "different tribunals according to the nature of the stipu- "lations of which a breach is charged.

"Now, the short and obvious answer to all this is, that "the contract is an entirety; and that, in order to ascer- "tain whether it is the proper subject of admiralty juris- "diction, we must look to the whole and every part of it, "the same as we must look to the whole and every part "of a contract when endeavoring to ascertain its legal "import and effect. *It must be wholly of admiralty cog-* *"nizance, or else it is not at all within it. There canno* *"be a divided jurisdiction.*

"The argument is also put in another form. Assum-

"ing the contract to be an entirety, and not partible, and "that it must be so viewed in endeavoring to ascertain its "nature and character with reference to the jurisdiction "to be exercised, it is urged that it must then appear "that all its material and substantial parts going to make "up the essence of the contract are maritime in their "character and object, and for the performance of mari- "time services; and that, inasmuch as the material parts "of the contract in this case are not of that description, "but relate to other subjects, such as the fitting up of the "ship and limitation of the number of passengers, it can- "not be regarded as the subject of admiralty cognizance.

"No doubt, if this analysis and interpretation of the "contract could be maintained the conclusion would be a "sound one."

It would seem obvious, on principle, that such must be the rule. The moment it is ascertained that a contract is an entirely,—that it is really one contract and not merely several connected contracts,—it follows that the only forum in which a remedy can be had for a breach of that contract must be that forum which has jurisdiction over the whole contract and every part of it. If there be a substantial part of the contract which is not within the admiralty jurisdiction,—a jurisdiction which is special and limited,—resort must be had to the courts of common law and equity, which alone possess general jurisdiction. It therefore cannot avail libelant to claim that the contract in question is entire and inseparable.

In some of the cases cited under this head and under the preceding one, a distinction is made as to stipulations, which though not maritime in themselves, are merely

incidental to a maritime contract. There are cases, no doubt, in which the existence of such stipulations will not deprive the contract of its maritime character. Thus a contract to supply a traveler with food and medicine, even at sea, is not necessarily a maritime contract. But a contract by the owner of a vessel to transport a passenger by sea, and, during the voyage, to provide him with food and medical attendance, all for a single price in gross, is undoubtedly a maritime contract. The transportation by sea is the principal thing and the various things to be done by the owner are so connected that the incidental things partake of the nature of that to which they are incident. So, where goods are delivered to a carrier for immediate transportation by sea, with a stipulation that, until *he* is ready to load them into the vessel, he shall store them in his warehouse, he is liable, during that period of storage, as a carrier and not merely as a warehouseman, and the whole contract is maritime. In such case, the storage is a mere incident to the transportation. But, if the contract be that the carrier shall receive the goods into his warehouse, and there store them while awaiting orders for shipment, and shall transport them by sea when directed by the shipper, all for a single fixed price, the storage is itself a principal thing, and is not so necessarily connected with the transportation as to partake of its character. And it is obvious that the bare fact that several promises are made in one contract, does not show that some of them are merely incidental to the others. That question must be determined by the nature of the acts agreed to be performed. It is, perhaps, difficult to frame a rule which will afford a proper test in

all cases; but we believe it to be generally correct to say that one of such acts will not be deemed merely incidental to the other, unless the latter act be, in its nature, the principal thing contracted for, and the former act be one intended to render the performance of the principal act more beneficial to the promisee, or to facilitate its performance. We believe that there has never been a case where a stipulation for the sole benefit of the promisor has been held to be a mere incident to the thing promised by him.

However this may be, the present case presents no difficulty on this score. As we have before pointed out, the alleged promise of respondents to pay railroad charges, concerned the libelant only in its capacity as warehouseman, while the agreement for transportation was made by libelant in its character as carrier. The case is precisely the same as if the warehouse had been operated by one person and the ship by another, and a separate contract had been made with each. The alleged promises in this case are as distinct in their nature as in the case supposed; and the only bond of union between them is the accidental fact that they were made with one person, who happened to be acting in those two different capacities. For all the purposes of this case, the libelant must be considered as two distinct persons,—the one a warehouseman and the other a carrier; and a promise made to it in the former capacity cannot be deemed merely incidental to an agreement with it in the latter character.

IV.

No question of application of payments arises in this case.

Counsel for libelant contends that libelant appropriated the $2.50 per ton, paid by the Howard Commercial Company, to the satisfaction of its demand for railroad charges; and that, therefore, it is suing here only for a balance due upon the freight by sea, which is within the admiralty jurisdiction. There are several conclusive answers to that contention.

(*a*) No such application is disclosed by the evidence. There is not a syllable of testimony to show that libelant ever made any particular application of that payment. On the contrary, libelant's own evidence shows (pp. 29, 34) that, after that payment had been made, libelant made a formal demand on respondents *for this particular $1.00 per ton;* thereby conclusively negativing any such appropriation of the payment as is now claimed.

Nor is any such application averred in the libel. It is there alleged that respondents agreed to pay $4.35 per ton for transportation from Moss Landing to San Diego, and that there had been paid $2.50 on account thereof; and (p. 4) that it was agreed that that sum "should be "credited as a payment, on account, toward the payment "of said sum of $4.35 per ton." Those allegations are entirely inconsistent with any appropriation of that payment to any particular item or items, and libelant is bound by its pleading.

The citations of the record in libelant's brief are not to the point. The testimony on page 30 simply shows

that libelant had paid this charge to the railroad company, and says nothing about any application of this payment. That settlement with the railroad company, moreover, was had (p. 33) on February 11, 1895, not only long after the payment in question, but (p. 34) long after a specific demand had been made on respondents for the payment of this particular item; and the witness testifies (p. 34) that, at the time of that demand, there was no entry on libelant's books of any such charge.

The citation to page 21 is to the opening statement of counsel for libelant, which is certainly not evidence. That to page 26 is to the opening statement of counsel for respondents, which is likewise not evidence, unless it contains an admission; and there is no such admission. The mere statement of counsel of their understanding of the difference between the parties as to the facts certainly cannot be taken as an admission of the correctness of any part of the statement of either,— clearly not as to a matter not put in issue by the pleadings. As, however, libelant's own testimony directly negatives the appropriatoin now claimed, the matter is not of much importance.

(*b*) The evidence shows beyond question that respondents intended that payment to be made on account of the $3.10 freight rate, and that libelant was well aware of that fact at the time of the payment. It was therefore bound to apply it in accordance with that known intention. When the intention of the debtor, at the time of payment, is known to the creditor, or is evinced by the

circumstances of the case, the creditor is as much bound thereby as by an express direction of the debtor.

Hanson v. *Cordano*, 96 Cal. 441;
Tayloe v. *Sandiford*, 7 Wheat. 14, 20;
Phillips v. *McGuire*, 73 Ga. 517;
Holley v. *Hardeman*, 76 Ga. 328;
Seymour v. *Van Slyck*, 8 Wend. 403;
Stone v. *Seymour*, 15 Wend. 19;
Shaw v. *Picton*, 4 B. & C. 715.

Thus, the creditor can not apply a payment to a debt of which the debtor was unaware, (73 Ga. and 76 Ga. *supra*,) nor to a debt which the debtor denies, (7 Wheat. *supra*,) nor to a debt which the debtor supposed was not yet entered on the creditor's books. (8 Wend. and 15 Wend. *supra*).

In the present case, the testimony of Mr. Cooper himself shows (pp. 27, 28) that the $2.50 per ton to be paid by the Howard company was fixed because that company had a special freight rate of that amount from San Francisco and expected to pay no more, and that it was understood to be a part payment on the $3.10 freight rate from Moss Landing. His conduct shows that he acted throughout on that assumption, for he testifies (pp. 29, 34) that, after that payment, he demanded *this identical $1.00 per ton*, from respondents. Mr. H. W. Goodall, a witness for libelant, testifies (p. 40) that, in the conversation between Mr. Cooper and Mr. Cook, (the last conversation between the parties,) Mr. Cook stated that the arrangement with the Howard Company was that they "should not be charged more than $2.50 *freight*," and

that Mr. Cooper said that, in that event, respondents "would have to assume" the back charges, in order to have the grain delivered at San Diego "at the usual rate."

Moreover, it is undisputed that, at no time during these conversations nor at any time until after this payment, did respondents, or even Mr. Cooper, know the amount of the alleged railroad charge, nor even whether there was any such charge. It was considered as a mere possibility. (Pp. 27, 28, 32, 33, 40.)

It is evident, then, from libelant's own testimony, that it was understood between the parties, in the beginning, that the payment of $2.50 per ton to be made at San Diego was on account of the freight by sea; and, of course, that was the understanding of the Howard company when it paid it. And, as, at the time of that payment, neither respondents nor the Howard company knew that there was any railroad charge to be paid, and as libelant was aware of their lack of information, it was bound to know that that payment could not have been intended to apply to any such charge. Libelant, therefore, had no legal right to apply that payment to anything but the sea freight.

(*c*) On November 16, 1894, respondents rendered to libelant a statement, (pp. 72-3,) in which they credited the payment of $2.50 to the account of the $3.10 sea freight, and which made no reference to any railroad charge. As this statement purported to be an adjustment of the whole transaction, it was an unequivocal repudiation of any liability for any such railroad charge. It cannot be pretended that, up to that time, libelant had

made any special application of the payment in question. At some time in November, the exact date not being alleged or proven, (pp. 4, 34,) libelant demanded of respondents this $1.00 per ton. As the grain was shipped on November 2, and the telegram to San Diego was sent November 6, there can be no presumption that this demand was made before November 16; and, as against the pleader and the party holding the burden of proof, it must be presumed to have been later. The adjustment between libelant and the railroad company was not had until February 11, 1895. It is therefore certain that no such application as libelant claims had been made (if any was ever made) up to the time of the rendition of respondents' statement. As that statement repudiated any liability for any railroad charge, this matter is ruled by the settled principle that the creditor can make no application after a controversy has arisen between the parties.

U. S. v. *Kirkpatrick*, 9 Wheat. 720, 737;
Robinson v. *Doolittle*, 12 Vt. 246, 249;
Milliken v. *Tufts*, 31 Me. 497, 501;
Applegate v. *Koons*, 74 Ind. 247.

V.

THE EVIDENCE DOES NOT SHOW THAT RESPONDENTS EVER CONTRACTED TO PAY THE ALLEGED RAILROAD CHARGE.

If, as we confidently believe, this controversy is not one of admiralty jurisdiction, it will not be necessary for the Court to examine the evidence on this point; and we might well rest the case without discussing it. But, lest we should be supposed, by silence, to admit the fact to be as contended by libelant, we will briefly refer the Court

to the evidence as to this matter. Counsel for libelant has undertaken to quote a considerable portion of the testimony in his brief; but his quotations are but partial, and much important matter is omitted.

On this question, the burden of proof is clearly on libelant. Libelant has alleged a contract to pay $4.35 per ton for carrying this freight. This allegation is denied by respondents; and libelant must, of course, prove it, and cannot recover except upon a preponderance of evidence.

The testimony of the witnesses is conflicting and, indeed, directly contradictory. As the witnesses are, so far as appears, of equal credibility. the contention of libelant must fail, unless there are circumstances in the case to turn the scale in its favor. No such circumstances have been pointed out by counsel for libelant; while, as we shall show, the circumstances, so far as they go, corroborate the testimony of respondents. As it will be necessary, if this point be considered at all, for the Court to read the entire evidence, and as that evidence is brief and simple, we shall not attempt any elaborate analysis of it. It will be sufficient to refer to the salient points.

It is conceded on both sides that, at some stage of the transaction, the attention of respondents was called to the possibility of back railroad charges on this grain; and the only dispute is as to whether that information was given before the conclusion of the bargain, and whether respondents ever agreed to pay any such charge.

Mr. Cooper, for libelant, testifies (p. 27) that he had a conversation with Mr. Ferguson, one of the respond-

ents, by telephone, in which he fixed the freight rate from Moss Landing to San Diego at $3.10 per ton, and that he then informed Mr. Ferguson "that there would "probably be charges on the grain from some point on "the narrow gauge railroad to Moss Landing"; that Mr. Ferguson stated that he might wish to have the grain delivered at San Diego at the Howard rate,—$2.50,— and that witness replied that that could probably be arranged. He does not claim that Mr. Ferguson agreed to pay any such railroad charge.

It was shown by libelant that the grain was shipped by a steamer which sailed November 2d. (P. 85.) Mr. Cooper testifies (pp. 28, 29, 35) that, on November 3d, (after the grain had gone forward,) he had a conversation with Mr. Cook, another of respondents, in which he "again spoke of the possibility" of such back charges; and that Mr. Cook thereupon requested him to telegraph the agent at San Diego to deliver the grain for $2.50, he agreeing that libelant should collect "the balance" from respondents at San Francisco. He does not claim that Mr. Cook expressly agreed to pay any railroad charge. He further testified (p. 29) that, in accordance with Mr. Cook's request, he sent a telegram on November 6th, directing the agent at San Diego to so deliver the grain, "turning in relief voucher "for *storage and balance freight rate* to be collected from" respondents.

The testimony of this witness shows (pp. 31–34) that, at no time during these negotiations, did he know or state to respondents that there would, in fact, be any

such railroad charge, nor, if any should be found to exist, how much it would be.

Mr. H. W. Goodall, for libelant, corroborated Mr. Cooper as to the conversation with Mr. Cook on November 3d.

This was all the testimony for libelant as tc the contract between the parties.

Mr. Ferguson, for respondents, testified (pp. 43–61) that he had several conversations on the subject with Mr. Cooper on October 26th and 27th. The substance of these conversations was this: He informed Mr. Cooper that, having had an inquiry for barley from the Howard company, he had found a lot at Moss Landing which had been quoted to him at a price f. o b. there, which lot would be available "if a rate could be ob- "tained by which it could be shipped." Mr. Cooper stated that the rate would be $3.10 per ton, and refused to give a reduction to $2.50,— the Howard special rate from San Francisco. Thereupon respondents closed the trade for the grain with Waterman & Co., but did not then pay them or receive the warehouse receipt. Mr. Ferguson then had a further conversation with Mr. Cooper, in which he informed him that he had purchased the grain on the basis of the quoted freight rate of $3.10, and requested Mr. Cooper to deliver it at San Diego on the payment of $2 50, agreeing that respondents would pay the difference of 60 cents. Mr. Cooper assented to this, but stated that there might be some "back charges" on the grain. Thereupon respondents procured the warehouse receipt, which showed a storage charge of 25 cents, and settled with Water-

man & Co. on that basis, deducting that amount from the purchase price. Mr. Ferguson then informed Mr. Cooper that he had obtained the warehouse receipt, and that it showed that the back charge was 25 cents per ton, which would make the total amount to be paid by respondents 85 cents per ton. To this Mr. Cooper assented. Respondents then sent the warehouse receipt to Mr. Cooper, and the grain went forward as before stated.

Mr. Cook, for respondents, testified (pp 63-84) as to several conversations between himself and Mr. Cooper. The material points were these : On October 26th, Mr. Cooper informed him that he had arranged with Mr. Ferguson to deliver the grain at San Diego for $2.50 and collect the balance of 60 cents from respondents. On October 27th he informed Mr. Cooper that there was a charge of 25 cents for storage shown by the warehouse receipt, and gave him a written memorandum showing the amount of barley, and specifying that respondents were to pay 60 cents per ton difference in freight and 25 cents per ton storage, on demand after shipment. Mr. Cooper made no objection. On October 29th he handed Mr. Cooper the warehouse receipt. On November 3d, after the sailing of the vessel, no bill for their indebtedness having been presented to respondents, Mr Cook, fearing that the bill might have gone forward to the Howard company, called on Mr. Cooper and requested him to telegraph his agent at San Diego. Mr. Cooper then, for the first time, spoke of possible back charges. Mr. Cook said that the warehouse receipt specified the back charges as 25 cents per ton. Mr. Cooper then

said there might be railroad charges from Blanco. Mr. Cook replied that there could be no such charge, because it was not specified in the receipt. After some discussion, Mr. Cook still persisting that the terms of the receipt must govern, Mr. Cooper agreed to telegraph as requested. Up to that time neither of respondents had heard anything about railroad charges, nor did they at any time know where this grain originated, nor what arrangements there were between the railroad company and libelant. (Pp. 33, 55, 73.)

It will be seen that respondents were purchasing this grain under circumstances which made it necessary for them to know, in advance, what it would cost, that they so informed libelant, and that they purchased the grain on the faith of their understanding with libelant. The fact that Mr. Cooper, on November 3d, informed Mr. Cook that there might be railroad charges, is therefore entirely immaterial. The grain had already been purchased and shipped, and the contract, whatever it was, was then complete. It is not claimed that Mr. Cook agreed, in terms, to pay any railroad charge, and notice to him of its possible existence was unimportant at that time. The whole question, then, turns on the conversations with Mr. Ferguson. Mr. Cooper says that he told Mr. Ferguson that there might be railroad charges. Mr Ferguson denies this, and says that all Mr. Cooper said was "back charges." Now, there is nothing in the world to corroborate Mr. Cooper; but the circumstances strongly suggest the probability of Mr. Ferguson's statement. It is not credible that a business man would purchase grain, as this was being purchased, subject to

a lien of wholly unknown extent. Mr. Ferguson had already stated to Mr. Cooper that the question of the purchase of the grain depended upon the terms he could secure from libelant; and it is not to be believed that, after being informed of a possible charge of an indefinite amount, he would have purchased the grain without a definite adjustment. When Mr. Cooper told him there might be back charges, he went and examined the warehouse receipt. Finding there a charge of 25 cents for storage, he assumed, and had the right to assume, (the receipt being negotiable,) that this was the only charge; and he purchased the grain on that basis. His testimony, being in accord with the probabilities of the case, is therefore to be preferred to that of Mr. Cooper.

Another significant circumstance in the case is the fact that libelant, though challenged to do so, (pp. 35–6,) was wholly unable to specify a single instance in which it had ever exacted any payment of any railroad charge from the owner of goods stored in the Moss Landing warehouse. Certain manifests and other entries (pp. 84–95) were produced in response to our challenge; but in each case, except that of the grain in controversy in this suit, the goods were shipped direct to San Diego from a point on the railroad, and were never in libelant's warehouse. It must, therefore, be taken as a fact, that in no case, other than the present one, has any such charge been made. It would indeed, seem highly improbable that such an attempt to repudiate the obligations of a negotiable warehouse receipt would not meet resistance at the outset. It is, therefore, at least probable that this charge was an afterthought; and, at

any rate, this circumstance is sufficient to cast a doubt on the reliability of Mr. Cooper's testimony.

But, even if we should assume every word of his testimony to be true, it does not prove any contract to pay this alleged charge. As we have before said, it is not claimed that respondents ever expressly agreed to pay it. The claim is that, from the alleged fact that they were notified of the possibility of such a charge, an agreement to pay it must be inferred. Such an inference might, perhaps, be drawn, if they had been informed that there *was* such a charge, which they would have to pay. But, when they were told (if they were told) that there might possibly be such a charge, they had an absolute legal right to assume that, if there were any, it would be specified on the receipt. Finding no such charge on the receipt, they had an absolute legal right to rely on its non-existence. The receipt did not even show that the grain had ever been over any railroad, and it expressly provided that the goods might be withdrawn from the warehouse, for local use or consumption, upon payment merely of the specified storage charges. It is not claimed that respondents were informed that there might be a charge *not specified in the receipt;* and therefore they had no notice of anything contradicting the receipt. Indeed, the receipt is made conclusive by statute, and libelant could not be permitted to contradict it.

Stats. Cal. 1877–8, 949 ; Secs. 5, 6, 8; (for which see appendix to this brief);

Bishop v. *Fulkerth*, 68 Cal. 607.

This receipt, in the hands of Waterman & Co., its indorsees without notice, was unquestionably conclusive. Their agreement to deliver the grain, f. o. b., was fully satisfied by their transfer of the receipt and the deduction, by them, of the charges therein stated, from the purchase price. Under such circumstances, respondents would have no recourse on Waterman & Co., and it is absurd to suppose that they would have purchased the grain with an unascertained charge upon it. At any rate, as no express agreement to pay any such charge was proved or claimed to exist, no such agreement can be inferred from the facts testified to by Mr. Cooper.

VI.

The demand in controversy is not admitted by the answer.

Counsel for libelant contends that the admission in the answer of the allegations of the fourth article of the libel, amounts to an admission of the allegations of the third article as to the contract. As the allegations of the third article are expressly denied, (pp. 12, 13,) a mere failure to deny them a second time cannot amount to an admission. Even if those allegations had been repeated in the fourth article, it would not have been necessary to repeat the denials. But they are not so repeated. The allegations of the latter article are merely as to the delivery of the freight and the part payment of $2.50 per ton; and the recitals that the delivery was "in full compliance with the agreement above stated," and that the payment was "pursuant to the agreement," are not new allegations of the fact of the contract, but

mere averments that, as matter of law, the delivery and payment were such as were required by the contract previously alleged. These averments might be, and were in fact, true, even although no such contract had ever been made. Respondents' answer, denying the contract, but admitting these latter averments, was therefore strictly correct.

Moreover, libelant, on the trial, treated the allegations as to the contract as denied, and introduced proof in support of them; and it cannot now be heard to claim that they were admitted.

VII.

THE DECREE PROPERLY AWARDED COSTS TO RESPONDENTS.

The libel in this case alleged a contract strictly and purely maritime, and a breach of that contract. The District Court, therefore, acquired jurisdiction of the libel. The answer denied the contract as alleged, admitted a contract for a less sum, and averred payment of part of that sum and tender of the residue. On the face of the pleadings, then, an issue was formed on a maritime question, and, on the determination of *that issue* in favor of respondents, they would, of course, be entitled to costs.

On the trial, libelant departed from the allegations of its libel, and undertook to prove, not a maritime contract for the payment of $4.35 per ton, but, at best, the maritime contract for $3.10 per ton admitted by respondents, and another and non-maritime contract for $1.25 per ton. As to the contract for $3. 0 per ton, the defenses of payment and tender were complete, and,

being proved to be true, entitled respondents to a judgment in their favor, so far as that issue was concerned. As to the alleged contract for $1.25 per ton, the court had no jurisdiction. It could not determine whether such a contract was made or not. When, therefore, it was proved that respondents had paid or tendered all that could be recovered from them in that forum, they were clearly entitled to their costs; and the court could not withhold costs because it was unable to determine whether or not respondents were indebted to libelant on some other account not within the court's jurisdiction. On the only matter within the jurisdiction of the court, the respondents proved a perfect defense, and the decree was therefore right.

It may be remarked that counsel's statement that the tender was made in full of all demands, is incorrect. The tender was in writing, (pp. 72, 73,) and was expressly made upon the demand of $3.10 for sea freight and 25 cents for storage As it was sufficient to satisfy those demands, it was not material for the court to inquire, and it had no jurisdiction to inquire, whether or not libelant had another and non-maritime demand.

We have discussed this case at much greater length than its pecuniary consequence demands; for which we hope that the importance of the principal question will be our excuse.

We respectfully submit that the decree should be affirmed.

E. B. & GEO. H. MASTICK,
For Appellees.

APPENDIX.

Extracts from Statute of California of April 1, 1878, (*Stats.* 1877–8, 949,) referred to on page 36 of this brief.

SEC. 5. Warehouse receipts for property stored shall be of two classes: First, transferable or negotiable; and second, non-transferable or non-negotiable. Under the first of these classes, all property shall be transferable by the indorsement of the party to whose order such receipt may be issued, and such indorsement of the party shall be deemed a valid transfer of the property represented by such receipt, and may be in blank or to the order of another. All warehouse receipts for property stored shall distinctly state on their face for what they are issued, as, also, the brands and distinguishing marks; and in the case of grain, the number of sacks, and number of pounds, and kind of grain; also, the rate of storage per month or season charged for storing the same.

SEC. 6. No warehouseman, or other person or persons, giving or issuing negotiable receipts for goods, grain, or other property on storage, shall deliver said property, or any part thereof, without indorsing upon the back of said receipt or receipts, in ink, the amount and date of the deliveries. *Nor shall he or they be allowed to make any offset, claim, or demand other than is expressed on the face of the receipt or receipts issued for the same, when called upon to deliver said goods, merchandise, grain, or other property.*

SEC. 8. All receipts issued by any warehouseman or other person under this Act, other than negotiable, shall have printed across their face in bold distinct letters, in red ink, the words non-negotiable.